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APPELLANTS' REPLY BRIEF

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 15

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC COMPANY,
UTAH RAILWAY COMPANY,
BAMBERGER RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

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INDEX

A — Page

OPINIONS IN DISTRICT COURT 1

B

BASIS OF JURISDICTION 2

C

STATUTES INVOLVED 2

D

QUESTIONS FOR REVIEW 2

E

ARGUMENT 3

EVIDENCE AS TO RELATIVE RATE LEVELS 3

EVIDENCE AS TO SIMILARITY OF CONDITIONS UNDER WHICH INTERSTATE AND INTRASTATE TRAFFIC MOVE 8

CONCLUSION 11

PROOF OF SERVICE 12

Cases Cited

Illinois Commerce Commission v. United States, 292 U.S. 474, 78 L.ed 1381 8

King v. United States, 344 U.S. 254, 97 L.ed 301 ..... 3 & 8

North Carolina v. United States, 325 U.S. 507, 89 L.ed 1760 ..... 8 & 10

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

A

OPINIONS IN DISTRICT COURT

The prevailing opinion of Circuit Judge Pickett and Judge Ritter and the dissenting opinion of Judge Christenson are

reported at 146 Fed. Supp. 803 and are reproduced at pages 39 to 65 of the printed record.

B

BASIS OF JURISDICTION

The basis of jurisdiction of this appeal is set forth in the appellants' brief heretofore filed in this case.

C

STATUTES INVOLVED

The statutes involved in this matter are set forth in the appellants' brief hereto filed in this case.

D

QUESTIONS FOR REVIEW

The questions presented for review in this appeal are as follows:

(1) Were the findings of the Interstate Commerce Commission challenged in the above entitled case supported by substantial evidence?

(2) May the court sustain the Interstate Commerce Commission's Order, without further evidence on the following?

(a) The presumption that interstate and intrastate rates were in proper relationship prior to the increase.

(b) The matter of common knowledge that intrastate and interstate traffic are intermingled on the same trains.

(3) May the Interstate Commerce Commission and the Court ignore the evidence of the protestants which detracts from the evidence of the railroads.

(4) May an attack be made in this action upon the legality of the Interstate Commerce Commission Order in Ex Parte No. 175.

E

ARGUMENT

This brief is filed in reply to certain matters set forth in the briefs of the United States and Interstate Commerce Commission and the intervening railroads and in particular as to the evidence in regard to the following points:

(a) The relative levels of interstate rates and Utah intrastate rates prior to the entry of the Interstate Commerce Commission order increasing the Utah intrastate rates 15%.

(b) The evidence that "the conditions under which interstate and intrastate traffic move are substantially the same with respect to all factors bearing on the reasonableness of the rate*."

EVIDENCE AS TO RELATIVE RATE LEVELS

Throughout their brief the intervening railroads confuse equality of increase with equality of rates. It is not disputed here that prior to the order in the 13th Section hearing the interstate rates reflected the Ex Parte No. 175 increase while the intrastate rates did not. However, from that fact alone nothing can be determined about which rates were higher for a comparable service. If intrastate and interstate rates were different, to apply an identical percentage increase to each would not bring them into line but rather would increase the difference between them.

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*King vs. United States, 344 U. S. 254, 97 L.Ed. 301.

Counsel for the intervening roads then go on from this false premise to a conclusion equally false. They argue that because the 15% increase was not made applicable to Utah intrastate rates by the Utah Commission, the railroads were being deprived of some $1,860,000.00 a year in gross revenue to which they were entitled. The appellants agree that if the Utah intrastate rates had been increased by 15%, and if such increase resulted in no loss of traffic, the railroads would have received additional revenue in the amount claimed. However, we do not agree that the railroads were entitled to such revenue and we maintain that the failure of the railroads to obtain such revenue in no way casts a burden on interstate commerce such as to permit the Interstate Commerce Commission to take jurisdiction of the intrastate rates.

The Government in its brief makes more of an attempt to analyze the evidence in this regard, however, it is able to point to little evidence in the record of interstate rates that are higher on a comparable basis than intrastate rates excepting a few instances which we have already noted in our original brief. There is evidence in the record in regard to coal rates showing that in some instances interstate rates are higher, including the 15% increase, than are intrastate rates without it. On the other hand, there is evidence of rates quite to the contrary. This evidence was commented upon by Judge Christenson in his dissenting opinion as follows:

> "Other evidentary matters mention in the prevailing opinion as a foundation for the Commission's conclusions are believed insufficient to permit plausible inferences to that effect in view of the record as a whole. Such disparity of rates as were shown are in both directions, and it is well established that mere disparity of rates establishes no sufficient basis for such an order." (R. 59).

The only other instances where the railroads presented evidence before the Interstate Commerce Commission to show interstate rates higher than intrastate rates was in the case of class rates between Salt Lake City and certain points in Utah on the one hand and between Salt Lake City and points in Idaho on the other. The effect of this class rate study, however, was completely destroyed by the evidence of the protestants which showed that the interstate class rates into southern Idaho were mere paper rates as there are in effect special merchandise rates on which the traffic actually moved which are substantially lower than the interstate class rates and are also substantially lower than the intrastate class rates on which such shipments must move intrastate, there being no intrastate special merchandise rates (Ex. 75, R. 736-738). In this regard the Interstate Commerce Commission in its order makes an unusual finding, it states that it gives no weight to the protestants' exhibit comparing intrastate class rates and interstate merchandise rates because it is not comparing like things. We are unable to see what difference it makes what name is applied to a particular rate. The fact remains that under the evidence, less than carload shipments of merchandise could move a similar distance interstate out of Salt Lake City at a lower rate than it could move intrastate even before the intrastate rates were increased by order of the Commission.

Two studies were made and introduced into evidence, one by the railroads and one by the protestants before the Commission, showing the per ton mile yield from intrastate shipments as compared with the per ton mile yield from interstate shipments. The figures introduced by the railroads are on a composite basis and make no effort to classify commodities. They show that in the year 1952, the average yield per ton mile on all commodities was as follows:

United States	1.43 cents
Western District	1.393 cents
Utah	1.258 cents

(R. 99).

The effect of ths study, however, is destroyed by the admission of the witness Kroll, who introduced it, that the consist of the Utah traffic is more heavily weighted in favor of low revenue, low cost products of the mine than is the consist of the traffic in the western district (R. 366). The railroad, therefore, to some extent, compares the yield on Utah gondola traffic with box car traffic elsewhere.

Mr. Robert Crandall, a statistician for the Public Service Commission of Utah, introduced a yield study breaking down the consist of the traffic into four categories. This table was based upon a weigh bill study prepared by the Interstate Commerce Commission itself, and shows the following results:

Products	Revenue Per Ton Mile	
	Intrastate Cents	Interstate Cents
Manufactured and Miscellaneous	3.63	1.52
Agriculture	2.57	1.14
Animals	4.15	2.71
Mines	1.06	.74
Total of All Products	1.21	1.06

(R. 116)

The Interstate Commerce Commission in its order discounts the effect of this evidence by pointing out that intrastate hauls are on the average shorter than interstate hauls and the revenue should be higher to compensate for the fact that terminal expenses bear more heavily per ton mile on a short haul than on a long haul. While this is true and might account for the fact that the revenue per ton mile on the intrastate shipments

would be somewhat higher than on interstate shipments, it certainly cannot account for the fact that on products of the mines the intrastate revenue is 143% of the intrastate revenue on a ton mile basise, and on products of agriculture 225%, on animal products 153% and on manufactured and miscellaneous products 238%.

The appellants again urge on the Commission that the overwhelming weight of the evidence in this case establishes that Utah intrastate rates are already higher on comparable consists at comparable distances without the 15% increase, than are interstate rates with such increase.

Both the government and the intervening railroads in their brief stressed the so-called savings clause in the Interstate Commerce Commission Order which provides that:

> "Increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroads, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor-carrier competition." (R. 119).

In our main brief we pointed out that this is an illusory protection because it is only on rare occasions where an interstate rate could be found over the same road and at a comparative distance as a measuring stock for the increase of intrastate rates. Counsel for the government maintains that we have taken this position without any evidence at all. The best evidence of this statment is found in exhibits of the witness Watson, Exhibits 24 to 30 inclusive (R. 471-500). Mr. Watson lists approximately 600 representative hauls for which commodity rates are in effect, approximately one-half of them intrastate, and approximately one-half interstate. As has been

pointed out above, in only a few instances are the mileage comparisons so that any comparison could be drawn. In the case of most intrastate commodity rates, there are no interstate rates of a like or lesser distance for the same commodity which could be used as a measuring stick. Once again therefore, we repeat, this limitation is illusory and means little.

EVIDENCE AS TO SIMILARITY OF CONDITIONS UNDER WHICH INTERSTATE AND INTRASTATE TRAFFIC MOVE

As is pointed out in the case of North Carolina v. United States, 325 U. S. 507; 89 L ed 1760, the railroads do not establish their burden of proof in a 13th Section case even if they were to prove—as we have pointed out above they did not do, the evidence being quite to the contrary—that interstate rates are higher on a comparable consist at a comparable haul than intrastate rates. This shows only one side of the picture. Rates must be related to the cost of moving the traffic which produces them. Therefore, when the railroad does not make a breakdown of its figures between interstate and intrastate, in addition to showing that the comparative situation is unfavorable to interstate commerce from a rate basis, the railroads must show that the factors affecting cost of handling intrastate traffic are not more favorable than those affecting interstate transportation. This appears to be the clear holding of King v. United States, 344 U.S. 254; 97 L ed 301, and Illinois Commerce Commission v. United States, 292 U.S. 474; 78 L ed 1381.

The commission in its report found that the conditions incident to the interstate transportation of freight in Utah are not more favorable than incident to the interstate transportation between Utah and adjoining states. We do not complain

of the sufficiency of the finding, but we do assert that there is no evidence to support such finding. The sole evidence as to this point, as we stated in our original brief, is evidence of certain railroad operating officials to the effect that interstate traffic and intrastate traffic are intermingled on the same trains, are handled over the same rails, through the same terminals and by the same crews. Neither counsel for the intervening railroads, nor counsel for the government in their briefs point to any evidence as to similarity of cost factors except this general testimony. They take the position, however, that such evidence is sufficient to establish such similarity of conditions, and it may well be that this is the principle point upon which this case will turn.

In our original brief, we stated that this was a matter that scarcely needed proof, but was a matter of common knowledge. The same thing is pointed out by Judge Christenson in his dissenting opinion (R. 59). Counsel for the intervening railroads asserts that this is not a matter of common knowledge, but is a matter which they proved by witnesses on the stand. We will agree that they did put witnesses on the stand to establish this point, but we say that such evidence was unnecessary because the Commission and the courts could take judicial notice of such matters of common knowledge and often have done so. It is certain that each member of this court was well aware of such fact long before reviewing the evidence in this case. Therefore, it is apparent that if such proof meets the requirements of the King case and the Illinois Commerce Commission case no evidence of the similarity of factors is necessary for they would always exist, and the requirement of North Carolina v. United States supra that the basis of federal jurisdiction must clearly appear from the record would be abrogated.

On page 20 of the brief of the United States and the Interstate Commerce Commission appears the following language:

> "It is possible, although not probable, that, notwithstanding identity in the character of interstate and intrastate operations there may exist special circumstances which affect interstate transportation solely or primarily and bring about higher or lower operating costs than for interstate transportation."

This is equivalent to saying that because of the fact that intrastate and interstate freight are intermingled, the burden of proof is on persons opposing the jurisdiction of the Commission to prove that factors affecting costs are different. This position is in direct contradiction of the following language in North Carolina v. United States, supra:

> "A scrupulous regard for maintaining the power of the State in this field has caused this court to require that the Interstate Commerce Commission's orders giving precedence to Federal rates must meet 'a high standard of certainty'. Illinois Central Railroad v. State Public Utilities Commission, 245 U.S. 493, 62 L. ed 425. Before the Commission can nullify a state rate, jurisdiction for the 'exercise of Federal power must clearly appear.' Florida v. U.S. 282, U.S. 194, 75 L.ed 291."

We again urge upon the court that the fact that intrastate and interstate traffic are intermingled does not establish that all factors affecting the reasonableness of the rate are the same. As we pointed out in our original brief, and as Judge Christenson points out in his dissenting opinion, this proof disregards the very essential element of density of traffic. Both the government brief and the railroads' brief admit that density of traffic is a factor which affects the costs of rendering service, but minimize it as one of many factors which can be disregarded, provided there is an intermingling of traffic. It is our

position that density is a major factor to be considered and may not be disregarded under the King case or the Illinois Commerce Commission case.

In commenting upon this matter Judge Christenson in his dissenting opinion stated:

> "No facts appear which make the conclusion rational that the density figures would, on any theory, represent a factor having no substantial bearing on the reasonableness of the respective rates.
>
> " * * * * The prevailing opinion places stress upon the evidence that there is no discrimination in the handling of intrastate and interstate freight shipments, since they are both handled on the same trains, by the same crews, and by the same departments and it is stated that 'Under such conditions, the contention of the plaintiffs has been rejected by the courts.' I cannot find that any court has gone to the extent of holding that such common treatment furnishes a basis of applying intrastate rate increases in the absence of evidence showing similar conditions with reference to all factors affecting rates." (R. 58, 59).

CONCLUSION

The holding of the Trial Court should be reversed, the Order of the Interstate Commerce Commission in this matter shoud be vacated, and the application of the increased rates enjoined.

Respectfully submitted,

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PROOF OF SERVICE

I, CALVIN L. RAMPTON, counsel of record for appellands, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of December, 1957, I served, on behalf of the appellants herein, copies of the foregoing Appellants' Brief, as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Stanley N. Barnes, Assistant Attorney General, Department of Justice, Washington, D.C.

2. On the Interstate Commerce Commission, by mailing a copy in an addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Charles H. Johnson, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

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